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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO HEADQUARTERS

BREWSTER KAHLE, INTERNET ARCHIVE, RICHARD PRELINGER, AND PRELINGER ASSOCIATES, INC., Plaintiffs, v. JOHN ASHCROFT, in his official capacity as Attorney General of the United States, Defendant.	**Case No. 04-CV-1127 MMC** **[PROPOSED] ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT** **Date: Friday, August 6, 2004** **Time: 9:00 a.m.** **Courtroom: 7, 19th Floor**

Upon consideration of Defendant's Motion to Dismiss, the Motion is hereby GRANTED. The Amended Complaint for Declaratory Judgment filed by Plaintiffs Brewster

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Kahle, Internet Archive, Richard Prelinger, and Prelinger Associates, Inc., is dismissed with prejudice because Plaintiffs have failed to state a claim upon which relief can be granted.

Plaintiffs Brewster Kahle, Internet Archive, Richard Prelinger, and Prelinger Associates, Inc. are individuals or organizations that exploit the creative works of others that are in the public domain by copying and distributing such works on the Internet. In this action, Plaintiffs seek declaratory judgment that four copyright statutes are unconstitutional because they allegedly create an "unconditional copyright regime" that prevents Plaintiffs from posting on the Internet works created by others between 1964 and 1978 without committing infringement. Specifically, Plaintiffs allege that (1) the Copyright Act of 1976, 17 U.S.C. § 301 *et seq.* ("1976 Act"), the Berne Convention Implementation Act, Pub. L. No. 100-568, 102 Stat. 2853 (1988) ("BCIA"), and the Copyright Renewal Act of 1992, Pub. L. No. 102-307, 106 Stat. 266 (1992) ("1992 Act") violate the Intellectual Property Clause "for failing to 'promote . . . Progress;'" (2) the 1992 Act and the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) ("CTEA") violate the "limited Times" provision of the Constitution's Intellectual Property Clause; and (3) the 1992 Act and the CTEA violate the First Amendment of the Constitution.[1]

The Supreme Court has repeatedly stressed "that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives." *Eldred v. Ashcroft*, 537 U.S. 186, 212, 123 S. Ct. 769, 785 (2003). Congress' exercise of its Intellectual Property

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[1] Plaintiffs also seek, upon the Court's finding that the CTEA is unconstitutional, to enjoin enforcement of the No Electronic Theft Act of 1997, 17 U.S.C. § 506(a) (1997) ("NET Act"), against them for infringement of copyrights for works in their renewal term first published between January 1, 1964 and December 31, 1977 that would not have a valid copyright "but for 17 U.S.C. §§ 302-304, as amended by the CTEA." Am. Compl. ¶ 1, Prayer for Relief. As the Court has found that Plaintiffs' claim that the CTEA is unconstitutional should be dismissed, Plaintiffs' injunctive relief request should also be dismissed. *E.g. Eldred v. Reno*,

Clause authority in enacting the challenged copyright statutes is subject to a rational basis review. *Id.*, 537 U.S. at 213, 123 S. Ct. at 785. Here, Congress had a rational basis for believing that the 1976 Act, the BCIA, and the 1992 Act "promote the Progress of Science."

For instance, the 1976 Act's elimination of the renewal requirement for works created on or after January 1, 1978 – establishing a single term of copyright protection for the life of the author plus 50 years – is a rational method of promoting the progress of science. Congress identified the copyright renewal revision as "[o]ne of the worst features of the present copyright law" because it was "a substantial burden and expense[;] this unclear and highly technical requirement results in incalculable amounts of unproductive work. In a number of cases it is the cause of inadvertent and unjust loss of copyright." H.R. Rep. No. 94-1476, at 134. Thus, Congress rationally believed that the 1976 Act's replacement of the renewal system with a life-plus-50 year single term would better promote progress by minimizing the burdens and expenses of renewals. In addition, as *Eldred* recognized, "the 1976 Act aligned United States copyright terms with the then-dominant international standard adopted under the Berne Convention for the Protection of Literary and Artistic Works." 537 U.S. at 195, 123 S. Ct. at 775-76 (citing H.R. Rep. No. 94-1476, at 135). The Supreme Court's *Eldred* decision recognized that giving U.S. authors the same copyright protection as those received by foreign authors also is a rational means of "promot[ing] the Progress of Science." Accordingly, a rational basis supports Congress' determination that the 1976 Act's elimination of the renewal term for works created on or after January 1, 1978 "promote[s] the Progress of Science."

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74 F. Supp. 2d 1, 2, n.2 (D.D.C. 1999) (same), *aff'd*, 239 F.3d 372 (D.C. Cir. 2001), *aff'd sub nom. Eldred v. Ashcroft*, 537 U.S. 186, 123 S. Ct. 769 (2003).

Furthermore, Congress rationally exercised its Intellectual Property Clause authority in amending the deposit requirement "to produce a more effective deposit system than the present one." H.R. Rep. No. 94-1476, at 150 (1976). In so doing, the 1976 Act's deposit requirement was a rational method of furthering the Intellectual Property Clause's "purpose of promoting the public interest in the arts and sciences." *Ladd v. Law & Technology Press*, 762 F.2d 809, 814, 815 (9th Cir. 1985) ("the deposit requirement here directly furthers the purpose of promoting arts and sciences by adding to the collection of our national library").

Congress also had a rational basis for believing that the 1992 Act's changes to the renewal registration requirements would promote the progress of science. The automatic renewal provisions apply only to those pre-January 1, 1978 works still in their first 28-year copyright term when the 1992 Act was enacted, *i.e.* works that acquired a first term of copyright protection between January 1, 1964 and December 31, 1977. S. Rep. No. 102-194, at 7 (1992). Thus, by granting automatic renewal to these works, the 1992 Act ensures that past and future authors are equally protected from losing their works "irretrievably into the public domain" based on an innocent failure to comply with renewal registration formalities. *Id.* at 5, 7. As the *Eldred* Court recognized, the Intellectual Property Clause empowers Congress "to secure the same level and duration of protection for all copyright holders, present and future." 537 U.S. at 199, 123 S. Ct. at 778. Accordingly, Congress' enactment of the 1992 Act is a rational exercise of Congress' authority under the Intellectual Property Clause that "promote[s] the Progress of Science." *See Eldred*, 537 U.S. at 208, 213, 123 S. Ct. at 782-83, 785.

Congress had a rational basis for believing that the BCIA's changes to the notice requirement would promote the progress of science. In 1988, Congress enacted the BCIA to bring the United States in line with the Berne Convention, an international convention aimed at harmonizing copyright law around the world. *Garnier v. Andin Int'l, Inc.*, 36 F.3d 1214, 1219 (1st Cir. 1994); H.R. Rep. No. 100-609, at 6-7 (1988); S. Rep. No. 100-352, at 1 (1988). Courts considering statutes implementing other articles of the Berne Convention have held that such enactments advance the goals of the Intellectual Property Clause when they secure the protection of copyrights of U.S. citizens overseas, and this Court holds that the BCIA is a rational way of advancing the goals of the Intellectual Property Clause as well. *E.g.*, *Eldred*, 537 U.S. at 205-06, 123 S. Ct. at 781 (enacting the CTEA "to ensure that American authors would receive the same copyright protection in Europe as their European counterparts" was a rational exercise of Congressional authority). *Luck's Music Library, Inc. v. Ashcroft*, -- F. Supp. 2d --, No. 01-2220 (RMU), slip op. at 17.

Further, as the Supreme Court in *Eldred v. Ashcroft* confirmed, a copyright extension for a fixed term, such as the CTEA, does not evade the Intellectual Property's "limited Times" constraint. 537 U.S. at 204, 123 S. Ct. at 781. The Supreme Court already considered and upheld the CTEA as a constitutional copyright term extension that does not violate the "limited Times" provision of the Intellectual Property Clause, and this Court declines to reconsider the Supreme Court's decision. *Eldred*, 537 U.S. at 204, 123 S. Ct. at 781.

Finally, neither the 1992 Act nor the CTEA alter "the traditional contours of copyright protection" – namely, the "idea/expression dichotomy" and the "fair use" defense comprising copyright law's built-in First Amendment accommodations – and thus require no further First Amendment scrutiny. *See Eldred*, 537 U.S. at 218-21, 123 S. Ct. at 788-90. Neither the CTEA nor the 1992 Act violate the First Amendment because they do not alter "the traditional contours of copyright protection" – namely, the "idea/expression dichotomy" and the "fair use" defense – and thus require no further First Amendment scrutiny.

For all these reasons, the Court grants Defendant's motion to dismiss.

SO ORDERED.

Date:

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Maxine M. Chesney
United States District Judge